

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6104

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-6104

B
P/S

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, New York 10463
Phone: 212 543 9038

Plaintiff-Pro Se
Appellant

BRIEF FOR
PLAINTIFF-APPELLANT

VS

UNITED STATES OF AMERICA
SECRETARY OF THE TREASURY
COMMISSIONER OF I.R.S.

ALVIN D. LURIE in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations, I.R.S.

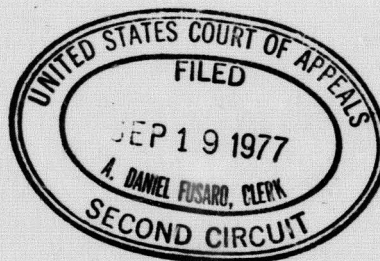
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, New York

BERNARD GOLDBERG
REUBEN MITCHELL
JOSEPH SHANNON
ROBERT CHRISTEN
VICTOR CONDELLO
HARRISON GOLDIN
JAMES REGAN

Individually as Trustees of Teachers Retirement System
of City of New York, 40 Worth Street, New York, N.Y.

Isaah Robinson
110 Livingston Street, Brooklyn, New York
Individually as Former Trustee, "TRS".

Defendants-Appellees



OFFICE OF COUNSEL

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LAW DEPT
CITY OF NEW YORK

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PRELIMINARY STATEMENT

JURISDICTION VENUE & NATURE OF ACTION: I am seeking injunctions to prevent the defendant "TPUSTEELS" from dissipating and reducing ^{the} assets of the Teachers Retirement System of the City of New York, herein referred to as

"TRS", by their illegal actions; to prevent the enforcement of PL 94-236 and obtain a declaratory judgment ruling such law unconstitutional; full restitution for losses sustained thru violation of Article 1, Section 10 and the Fifth and Fourteenth Amendments of the Constitution of the U.S., of 42 USC section 1983, of 26 USC 401 and 503, of SEC Act 1934 Section 10 (b) and Rule 10 b-5, of 15 USC 78j(b); and judicial review and relief under 5 USC 702/706 to secure enforcement of 26 USC 401, 503, & RR70-131.

2. This Court has jurisdiction of this action under the Constitution of the U.S., 5 USC 702/706, 28 USC 1331, 28 USC 1343 (1) & (3), 28 USC 2201, SEC Act 1934 Section 10 (b) and Rule 10 b-5, and 15 USC 78J (b), & 17a.

STATEMENT OF THE CASE

A. AFFIDAVIT. March 17, 1977.

Alfred Kirshner, being sworn deposes and says:

1. I reside at 98 Van Cortlandt Park South, Bronx, New York 10463. I submit this affidavit in support of a motion for Preliminary Injunctions.
2. I filed the verified complaint in this case.
3. I taught in New York City High Schools for 25 years and was retired for disability on February 19, 1953. I have since been receiving a pension from the Teachers Retirement System of the City of New York, hereafter referred to as TRS. My present pension is approximately \$3,000. a year, (Exhibit A).
4. In the 24 years since retirement I have never once received a statement or financial report from TRS. When the financial crisis of NYC hit the headlines in 1975 and I read in the N.Y. Teacher, publication of the United Federation of Teachers, (hereafter referred to as UFT), "TEACHERS SAVE N.Y.C." by buying \$275 million of MAC bonds and in the New York Times November 19, 1975 Mr. Rohatyn, Chairman of

MAC quoted as saying:

"that the unions had agreed, in addition to buying \$2.5 billion in new (NYC) securities, to renew on a long term basis the \$1.2 billion in City and MAC paper they now hold. He said that such an investment would be almost as great as that of the Federal Government and the banks combined." (Exhibits B & C).

I became alarmed because the TRS is not a union pension fund, most pensioners never having been union members, since they retired before UFT received bargaining recognition. Yet the union while bargaining for wages for presently employed teachers was deciding on TRS investments, and using money retirees had contributed to TRS.

I wondered if teacher pensioners could or should shoulder the burden of years of City financial mismanagement. Why should we be punished for the sins of others?

I decided then to make an in depth study of TRS.

5. The last published Annual Report of TRS for fiscal year 1973-74 revealed that there were approximately 25,000 retiree members and 80,000 employed members. Of the retirees approximately 8,000 were receiving less than \$4,000 a year. The average pension was \$6,700. The pensioners were aged, widely scattered, unorganized, politically powerless, without representation and voiceless, since they were not permitted to vote for the three teacher trustee members of TRS.

6. There are seven TRS trustees. Three trustees are teacher members elected by presently employed members of TRS. The approval of at least one teacher trustee member is required for investment decisions. The UFT has made TRS a captive subsidiary by designating its teacher trustee candidates and refusing other candidates, though union members in good standing. Equal space in its weekly newspaper, The New York Teacher, mailed to all employed teachers, has been denied. This is attested to in the attached affidavit of Mr. Joel Frank. (Exhibit D, 2 pages).

7. Further evidence of a clear conflict of interest is shown by the fact that two of the three teacher trustees of TRS are on the payroll of the union although they are obliged to work full time for TRS to receive their City pay. They have discriminated against

the interests of the minority pensioner members of TRS by dissipating TRS assets to provide funds for NYC to maintain employment, and secure salary increments. Union President Shanker negotiates TRS investments in NYC obligations although he is not a TRS trustee. (Exhibit E, 5 pages). By delegating their fiduciary responsibilities to Mr. Shanker and by discriminating against the interests of the pensioner minority of TRS for the benefit of the UFT, the three teacher members have deliberately, consciously, and repeatedly breached their duties, as Trustees.

8. The Shinn Report, March 17, 1976, of the Mayor's Management Advisory Board, (Exhibit F, 3 pages), revealed in Table A-6, that the funded liability to pay lifetime pensions to the 25,000 retired TRS members was \$1,615,000,000 as of June 30, 1974. This constituted 87% of the \$1.85 billion in assets on hand and indicates per capita retiree assets of \$64,600 allocated to pay lifetime pensions for them, in the Fixed Fund of TRS. On the same date, funded assets for the 80,000 presently employed TRS members was \$239,300,000 or 13% of total assets on hand and per capita assets of presently employed as \$3,000. The unfunded accrued liability due the presently employed TRS members is given as \$2,768,800,000.

9. The wide discrepancy between per capita retiree assets on hand of \$64,600 and per capita assets of \$3,000 for presently employed TRS members is due to the fact that most retirees made sizeable contributions to TRS while employed and on retirement the City funded the individual accounts while in recent years union contracts with the City provided that the City pay most of the required contribution. However the City has failed to maintain its contractual contributions for present TRS employees so that the unfunded accrued liability to TRS as of June 30, 1974 was over \$2.7 billion and for the five City employee pension funds more than \$8.4 billion. This \$8.4 billion unfunded accrued liability is not included by the city in its published balance sheet showing total city debt as over \$12 billion as of June 30, 1976.

10. Equally alarming was the Kinzel Report of the New York State Permanent Commission

on Public Employee Pension and Retirement Systems of March 1975 which found that the ratio of available assets as a percentage of liabilities for TRS as of June 30, 1973 had dropped to nine per cent and that by 1977 "there will be no assets in these systems which could be allocated to cover the liabilities for benefits already earned by active members. Indeed the assets will be insufficient to cover the pension reserve for retirees at that time." (Exhibit G, 3 pages).

11. Thousands of teachers are eligible to retire now on the basis of age or service. This constitutes a clear and present danger because pensions cannot be paid with unfunded accrued liabilities nor with non-liquid Caa rated NYC bonds. With no market for NYC obligations TRS could be bankrupt, it could experience devastating losses, and be unable to pay present pensioners.

12. Both the Shinn Report and the Kinzel Report recommended an annual increase of \$200 million for the five NYC employee pension funds to provide 40 year funding for the \$8 billion debt. Almost two years has passed and no move has been made by the City to meet this contractual obligation. (Exhibit H).

13. TRS Trustee defendants jeopardized the stability of TRS by the purchase after September 1975 of \$275 million MAC bonds which do not have the full faith and credit guarantee, which in fact divert City tax income from City bonds already owned by TRS. Then on November 26, 1975, TRS trustees signed an illegal "Agreement", (Exhibit I, 3 pages), with the Clearing House Banks and the City Sinking Funds. TRS agreed to purchase an additional \$860 million of NYC bonds before June 30, 1978 increasing its holdings of City obligations to 51% of its entire asset portfolio.

14. TRS defendant Trustees gave evidence of their intent to violate fiduciary and federal laws by insisting that the New York State Legislature pass a bill exempting them from liability as fiduciaries, transferring liability to New York City and passage of a bill by Congress exempting them from the obligations of IRS 401a & 503b, before implementing the \$860 million NYC bond purchase "Agreement". (Exhibit J).

15. Immediately after the New York State Legislature passed Chapter 890L 1975, the historic "advance indulgence" law, but before Congress passed PL 94-236 (Exhibit K, 2 pages), TRS Trustee defendants sent two letters of intent in December 1975 to the Internal Revenue Service in Washington, D. C. asking approval for the purchase of \$182 million NYC bonds, despite the apparent violation of IRS 401a and 503b. Assistant Treasury Commissioner Lurie in letters of December 5 & 13, 1975 gave approval, (Exhibit L) illegally in my view. On those dates TRS Trustee defendants sold \$212 million of TRS sound, varied, highly-rated corporate bonds at a loss of \$30 million (Exhibit M, 2 pages) and purchased \$182 million NYC bonds rated by Moody Caa, below investment grade, at par when they were available at market at a 20% discount. This increased the holding of TRS in NYC obligations at that time to 32% of total assets.

16. This \$30 million cash loss and replacement of high quality diversified corporate bonds by non liquid, Caa-rated highly speculative, overpriced NYC bonds caused irreparable injury, to me and all TRS members. In my view the purchase was illegal. It violated IRS 401a and 503b, RR 69-494(4) and RR 70-131, C.B. 135. The Treasury Department IRS Assistant Commissioner Lurie arbitrarily failed to do his duty to carry out IRS laws and safeguard the assets of TRS members, by failing to apply to the exclusive benefit and prohibited transaction rules.

17. NYC bonds are an unsound investment for TRS because:

- a. They are rated Caa by Moody's, below investment level and removed entirely from listing by Standard & Poor's. (Exhibit N, 2 pages).
- b. Income from NYC bonds is tax free. Equivalent return from corporate securities which are tax free to TRS is obtainable from approved quality Grade A or Aa. Superior quality is essential for a sound pension fund portfolio.
- c. 35 to 51% investment in any one security is an unsound practice. ERISA limits employer investment to 10%. 35 to 51% investment in NYC bonds by TRS is in violation of RR 70-131, 1970-1, C.B. 135 because the security for the debt is inadequate.

d. The varied and highly-rated corporate securities would better serve the exclusive benefit rule if held instead of sold at a loss.

e. Under the November 26, 1975 "Agreement" all NYC bonds held by TRS must be retained at maturity as no other creditors are required to do.

f. The New York Bank for Savings, fourth largest in the USA, reported NYC holdings as of December 31, 1975 as less than (1/4) of one quarter of one per cent of assets. (Exhibit O).

g. The six largest NYC banks held approximately \$3.5 billion NYC obligations in June 1974. By December 31, 1975 their holdings were reduced to \$1.7 billion or 86/100 of 1% (Exhibit P).

18. Mr. James E. Smith, Controller of the Currency, on October 8, 1975 presented a statement at a Hearing before a Subcommittee of the Committee on Government Operations of the House of Representatives studying the "Adequacy of Federal Agency Studies Into National Impact of a New York Default." The following is a xerox copy of the U.S. Government Printing Office publication of pertinent material on pages 12, 13, and 14 of the report:

Under 12 U.S.C. 24 the Comptroller has been authorized by Congress to prescribe limitations on the purchasing of investment securities by national banks and to define the term "investment securities." Our regulations on this subject apply not only to national banks, but also to State banks which are members of the Federal Reserve System.

The term "investment security" is defined at 12 C.F.R. 1.3(b) as a marketable obligation in the form of a bond, note, or debenture which is commonly regarded as an investment security and does not include investments which are predominantly speculative in nature. Thus, while bankers may extend credit to their customers by making loans or purchasing bonds and while they may make speculative loans, they are legally prohibited from purchasing a speculative bond.

If an examiner discovers that a bank holds a security which, though deemed to be of investment quality when purchased, has declined to a speculative rating, he will

classify the amount of its market depreciation as a doubtful asset. The bank will not be required to write off these doubtful assets, but the amount of all doubtful assets will be considered by the examiner in evaluating the adequacy of bank capital and reserves. The examiner also must estimate the bank's potential need to sell its speculative or depreciated securities before they mature. For example, a bank holding a substantial amount of New York City securities would not be required to incur any loss unless the bank were forced by circumstances to sell those securities at current

Rating services frequently may differ in classifying certain securities as speculative, and my Office recognizes that any rating is only one expert opinion. In any case, it is incumbent upon a banker to maintain complete credit files to allow our examiners to review the facts and draw their own conclusions on the quality of each security. However, when a recognized rating service has rated a security at less than investment quality, bankers are put on notice that the onus is upon them to convince the examiner that the security is, in fact, a sound investment..

19. In the report of the same hearing Mr. Frank Wille, Chairman, Federal Deposit Insurance Corporation, stated on page 55, "Each of the bank regulatory agencies restricts investments in State and local and other obligations to those that are of investment grade. Investment grade has been defined traditionally as those that are in the top four rating categories, by a rating agency such as Moody's or Standard & Poor's."

20. In April 1975 Standard & Poor had completely delisted NYC bonds. They were not even rated BB speculative or B low grade, investment characteristics virtually nonexistent.

On November 3, 1975, Moody's downgraded NYC bonds to Caa (Exhibit N, 2 pages).

Caa is seventh in Moody's rating standard. This is three levels below the minimum set by the Controller of Currency for all National Banks and State Banks which are members of the Federal Reserve System. This is three levels below the minimum standard set for bond purchases or holdings by the Federal Deposit Insurance Corporation. Yet on November 26, 1975 TRS Trustee defendants agreed to increase NYC obligation holdings by buying \$860 million Caa rated NYC bonds bringing the total to 51% of all portfolio assets as of June 30, 1978.

21. The standards set for State and National banks by the Controller of Currency and the standard set by the Federal Deposit Insurance Corporation over a period of many years of experience protecting the assets of American citizens can surely be no higher than those required by 26 USC. 401a; 26 USC. 503b; RR69-494; and RR70-131, CB135 to protect the TRS assets of the plaintiff and the minority pensioners. (Exhibit Q, 3 pages)

22. The current \$700 million budget deficit is a clear indication of New York City's present predicament. Its financial prospects can also be considered in the light of two comments by experts in the New York Times:

On March 3, 1976 Mr. Rohatyn, Chairman of MAC said, "a holder of New York City short term notes would have to have a long life expectancy to get his notes redeemed."

On May 28, 1976, Richard R. Shinn, Chairman of Mayor Beam's Management Advisory Board (and President of the Metropolitan Life Insurance Company), said that "the expectation of balancing New York's budget by 1978, as required by the city's financial plan, is foolhardy."

23. Since 86% of TRS pensioners are over 65 years of age and 35% over 75, our life expectancy is extremely limited. Unless the defendant TRS trustees are enjoined from further sale of TRS assets and the purchase of NYC obligations, and all Defendants enjoined from the enforcement of PL 94-236 which nullifies IRS exclusive benefit and prohibited transaction rules, the plaintiff and all TRS pensioners will suffer irreparable damages with the possibility of being unable to recover damages from a bankrupt or financially distressed New York City while we are still alive.

Sworn to and subscribed before me, this 17
day of March 1977.

Alfred Kirshner

Alfred Kirshner

Alfred Kirshner

NOTARY PUBLIC
JAMES J. JONES
JAN 1 1977

BACKGROUND

A A review of the nature of pension systems is appropriate because it bears directly on the issues in this case. There are two basic kinds of pension systems; the fully funded and the pay-as-you go types.

1. The fully funded type is solvent. It has sufficient assets, determined actuarially, to meet the liabilities for benefits earned by its members. Examples of this type are T.I.A.A. which covers most college teachers in the U.S.A.; the N.Y.State Teachers Retirement System; and the employees Retirement plan of the Metropolitan Life Ins. Co.

2. The pay-as-you-go plan has insufficient assets to meet the liabilities for benefits earned by its members. It is often insolvent because the employer lags in paying up his contribution. When such an employer goes bankrupt his IOU's in the employee pension fund have no value and the pension plan goes bust too. This happened when the Studebaker Co. folded and thousands of its employees with many years of service saw their pension investments destroyed.

The frequency of such occasions led to a reform bill, ERISA which now provides protection and regulation for 600,000 corporate pension plans. In addition the 600,000 pension plans are covered by 26 USC 401 which is the federal version of the prudent man rule expanded to^{be} the exclusive benefit for beneficiaries rule.

B. State and local public employee pension plans are not covered by ERISA. The 6,000 plans of this category are covered by 26 USC 401 the exclusive benefit rule and the prohibited transactions rule 26 USC 503. Both of these regulatory reform bills were passed in 1933. The 5^{NYC EMPLOYEE} Pension Funds including TRS are all registered with the IRS which is the regulatory control agency for 26 USC 401/503.

C. TRS has two separate pension plans. All presently employed teachers belong to a pay-as-you-go plan which is insolvent. All retired TRS

teacher members belong to a fully funded pension trust which is solvent and has sufficient capital investments to pay all its retired teachers their actuarially determined pensions for life.

PENSION FUND INVESTMENT POLICY*

Preservation of capital under a fiduciary relationship between trustees and pensioner/investors under the 146 year old prudent man rule governs pension fund management policy. This has been spelled out for trustees of tax exempt pension funds by

- A. 26 USC 401 and its RR 69-494 which establish the exclusive benefit of employees requirements for investments:
 - 1. Cost must not exceed fair market value at time of purchase.
 - 2. Fair return.
 - 3. Liquidity.
 - 4. Diversity.
 - B. 26 USC 503 b defines "prohibited transactions" & includes those which
 - 1. Lend any part of its corpus to the employer without the receipt of "adequate security". Defined below.
 - 2. makes substantial purchase of securities for more than adequate consideration from employer.
 - 3. engage in any other transaction which results in a substantial diversion of corpus to employer.
- 503c-1b1 defines "adequate security as something in addition to and supporting a promise to pay, which is pledged to the organization that it may be sold, ...in default of repayment of loan, value and liquidity of which security is such that it may reasonably be anticipated that loss of principal or interest will not result from the loan." RR70-131: ^{SAYS}pledged employers general assets is not adequate.
- C. Management of quality of investments is determined by the same standards as those established for banks. In fact, TRS is limited by law to those investments which are legal for purchase by N.Y. State savings banks. Moody's and Standard & Poor's ratings are used

as standards by the U.S. Comptroller of Currency under 12 USC 24 and 12 C.F.R. 1.3(b).

D. Under ERISA the 600,000 pension funds are limited to 10% investment in employer securities. SEC Statistical Bulletin reported that as of Dec. 31, 1974 the 6000 public employee pension funds had assets of \$93.3 billion. of that total only 9/10 of 1% was invested in State and local securities.

E. Sound pension fund investment policy dictates that corporate bonds of high quality be held to maturity for full return. To sell them at a discount before maturity when they are producing adequate interest to meet actuarial requirements is a waste of assets.

F. Since municipal bonds are tax free, corporates are a better investment for tax exempt pension funds because the yield is higher for equivalent Moody rating.

*Cohen, J.B. Investment Analysis and Portfolio Management.

*R. Murray. Economic Aspects of Pensions

LEGAL ARGUMENT

Introduction

Acting Trustee. Private attorneys general.

Since TRS Trustees breached their fiduciary trust

a. by demanding and receiving exemption from fiduciary financial liability under NYL 1975 Chapter 890 and PL 94-236

b. by violating 26 USC 401 & 503 by selling TRS corporate bonds at a loss of 50 million and buying NYC bonds at above market
a remedy is required to protect the diminishing assets of TRS to prevent further depletion and waste. Therefore plaintiff Kirshner steps into the shoes of TRS Trustees as Acting Trustee. Alternatively for the reasons above acting as Private Attorneys General.

CITATIONS

Eaves v Penn 426 F. Supp 831

FCC v Sanders 309 US 470

Plaintiff Kirshner qualifies as Acting Trustee & Private Attorneys General because he is significantly involved.

a. He receives a TRS pension of \$3000 yearly. He has a life expectancy of 13 years , i.e. a vested interest in an expectant lifetime pension of \$39,000 which he seeks to protect.

b. He is a member of the Board of Directors of the N.Y. Teachers Pension Assn. which is paying the costs of this action and has approved it.

c. he is a member of the TRS Pensioner Minority of 25,000 retired teachers in like situation, and one of the 8,000 of that number receiving less than \$4,000 yearly with no cost of living increase since 1970.

CITATION

Data Processing Service v Camp 397 U.S. 153.

I

FEDERAL SECURITIES LAW VIOLATIONS

The Court below erred in finding "Nor do plaintiff's claims under the federal securities laws state a claim. It is undisputed that Kirshner was not a purchaser or seller of securities in issue. Thus he has no standing to assert a private cause of action under Section 10(b) or under Rule 10(b)5. Blue Chip Stamps v Manor Drug Stores, 421 US 723."

STANDING

STOCKHOLDER DERIVATIVE SUIT v TRUSTEE DEFENDANTS.

A 1. TRS Trustees right to make investment decisions was voided when they breached their fiduciary duty by demanding and obtaining exclusion from fiduciary liability and exclusion from IRS regulations 26 USC 401/503. Consequently this action is a stockholders derivative suit v TRS Trustees for fraud in violation of Securities Laws 10b, 10(b)5, & 17a, & 401/503.

CITATION

Slip decision Oct 20, 1976 Klamberg v Roth 75 Civ 1507 , 2nd District Court Judge Cannella ruled in a pensioner/stockholder derivative suit, "Plaintiff as beneficiary of a trust, has standing to bring an action based on 10(b)... and Rule 10(b)5..., against the trustees of the trust."

CITATION

In Daniel v Intern. B. Teamsters, August 20, 1977, Seventh Circuit Court of Appeals, # 76-1855, held that :

Interests in pension funds are securities.

An employee interest in a pension fund is an investment contract like an interest in a mutual fund or variable annuity contract.

Pension member contributions are investments.

17a of the Securities Act of 1933 impliedly provides for a private cause of action.

Federal District Court has jurisdiction to hear complaint of pension member regarding exclusive benefit breach by pension fund trustee.

The decisions above cover the issues raised by Kirshner & support his standing

A 2. In the Blue Chip Stamp opinion the Court page 738 recognized the plaintiffs right to a derivative action citing Schoenbaum v Firstbrook 405 F.2d 218 a case like Kirshner in respect to denial of discovery.

A 3. Blue Chip Stamp does not apply because it dealt with potential stock purchasers who tried to secure damages for failure to obtain stock which would have provided a profit. Unlike Kirshner (TRS corpus) Manor Drug did not experience injury or loss and was not acting as a stockholder in a derivative suit charging trust assets were fraudulently depleted and destroyed in violation of Securities laws 10b, 10(b)5, & 17a.

The Court below erred in finding "Plaintiff has no claim under Section 17(a)...since there exists no private cause of action based upon that statute. See Welch Foods Inc. v Goldman Sachs 398 F. Supp.139"

Quotation below from page 1393 says the opposite because fraud is alleged in this case.

And Judge Friendly, in his concurring opinion in *S. E. C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 864 (2d Cir. 1968), *cert. denied*, *Coates v. S. E. C.*, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969), has taken the position that Section 17 was not intended to be the basis of any private actions; that, on the other hand, there seems little practical point in denying a private action under Section 17 once it is established that a buyer has an action

under Section 10(b) of the Exchange Act, "with the important proviso that fraud, as distinct from mere negligence, must be alleged"; and that to

20. Even those courts which have implied a civil remedy under Section 17(a) have done so only where fraud, as distinct from mere negligence was present. *Trussell v. United Underwriters Ltd.*, *supra*; *Fischman v. Raytheon Mfg. Co.*, *supra*; see *Weber v. C.M.P. Corp.*, *supra*; 6 Loss, Securities Regulation 3014 (2d ed. Supp.1969). No fraud is alleged in Count II of the instant complaint.

B.

TRS TRUSTEE DEFENDANTS DEFRAUDED TRS OF ASSETS IN VIOLATION OF SECURITIES LAWS 10 b, 10(b)5, & 17a as follows:

B1. Losses to TRS due to Trustees actions:

- a. \$50 million reduction in TRS assets by sale of A & AA rated corporate bonds below cost, although producing adequate return, in order to secure funds to buy MAC & NYC bonds Aug-Dec.1975.ExhibitM1
- b.Purchase of \$527 million NYC bonds of undeterminable value at above market price.
- c.Loss of \$188 million in interest in MAC bond exchange of 11% bonds for 6% bonds, Ex I, paragraph 5b.

d. Increase from 6% to 41.5% of unmarketable NYC bonds in TRS portfolio in the past two years. With "Agreement" contract to increase this to 56.5% by June 28, 1978.

e. Destruction of fully funded character of TRS trusts jeopardizing future payments of pensions, by substituting illiquid NYC bonds for liquid corporates.

B2. The alleged wrongful acts included the use of telephones and US mail in violation of 10b, 10(b)5, and 17a.

B 3. ALLEGED WRONGFUL ACTS OF TRS TRUSTEE COMPTROLLER HARRISON GOLDIN.

Comptroller Goldin deceived & mislead TRS by failing to disclose the risk involved in the purchase of NYC bonds by concealing, omitting to state the following material facts of which he had prior knowledge, to TRS Trustees, when he recommended purchase of NYC bonds and approval of the Nov. 26, 1975 "Agreement" by which TRS Trustees agreed to buy an additional \$860 million NYC bonds:

a. his knowledge of NYC's critical insolvent financial situation dating back to October 1974 a year before the "Agreement".

b. that on Dec. 17, 1974 ^{Mayor Beame} had proposed to city banks and underwriters a 4 part program which included purchases of city bonds by the city pension systems.

c. After July 1974 Morgan Guaranty bought no city securities for its fiduciary accounts. After Jan. 1975 Citibank had the same policy.

d. In the two year period prior to the "Agreement" the Clearing House banks had reduced their holdings of NYC securities by \$2½ billion.

e. That Standard & Poor had suspended rating NYC bonds on April 12, 1975 and Moody's had dropped the NYC rating to Caa Oct. 29, 1975.

f. that Moody Caa (Ex N 2 pages) is 7th in Moody's rating system, three levels below the minimum set by the Comptroller of Currency for National Banks and by FDIC regulations for its members standard for investment. Yet Mr. Goldin recommended bonds illegal for bank investment to TRS. an act of bad faith.

g. that while acting as both seller and buyer of NYC bonds he was in a conflict of interest situation and that he was putting the interests of NYC ahead of the conflicting interest of TRS.

Comptroller Goldin's intent to defraud is evident by the omission by him of the material facts above to TRS Trustees.

B 4. ALLEGED WRONGFUL ACTS OF TRS TEACHER TRUSTEES MITCHELL, GOLDBERG, SHANNON

a. Trustees Mitchell & Goldberg showed intent to defraud and engaged in deceitful conduct by conspiring to conceal from the other TRS Trustees the contents of the Josephson legal opinion received prior to the signing of the "Agreement" . The opinion contained material facts essential for deciding if TRS should sell corporate bonds in its portfolio at a loss in order to buy NYC bonds and material facts necessary to decide if the purchase of NYC bonds was legal and prudent.

It stated that the proposed purchase of \$860 million of NYC bonds was imprudent, speculative, unjustified, inherently improper, and an illegal prohibited transaction. It pointed out that the TRS risk in investing in NYC bonds was inequitably distributed among Retirement members with fully funded Pensioner Minority having almost everything to lose and TRS Teaching Majority having almost nothing to lose and everything to gain.

CITATION

Josephson also called attention to a parallel situation in

Blankenship v Boyle 329 F. Supp. 1089

where the Court rejected pension fund trustees claim that the investments in employer securities was warranted because it would provide more jobs and increase contributions to the fund on the ground that investments for the Union's principal benefit was self dealing.

b. in the Dec. 7, 1975 NY Teacher, publication of the United Federation of Teachers, Mitchell & Goldberg were joined by the third teacher TRS Trustee Shannon in an article which deceived and misrepresented:

"Since present city contributions amount to \$300 million a year, this new money would approximately cover the \$860 million dollar commitment."

This is completely false because the entire annual city contribution is applied to the unfunded accrued liability of \$2.7 billion owed the present Teaching Majority trust which is separate from the (once) fully funded Pensioner Minority trusts. None of the city's contributions go to the pensioners trust. The purchases of city bonds was made with the Pensioner Minority's lifetime savings and deferred wages invested in a completely separate trust and threatens only their pensions.

B 5. ALL TRS TRUSTEES DEFRAUDED TRS.

- a. by using paragraph 7e(iii) as a manipulative device to secure passage NYL1975 Chapter 890 to shed fiduciary liability before buying \$182 million NYC bonds in Dec.1975, contravening rules for the protection of investors i.e. prudent man; exclusive benefit and prohibited transaction rules 26 USC 401/503.
- b. by omitting to state to IRS in requests for Dec 1975 purchase letters of approval that \$182 Million NYC bond purchase required the sale of A, AA corporate bonds, producing adequate returns at a loss of \$30 million to TRS.
- c. omitted to state to IRS the material fact that the Aug-Oct.1975 purchase of \$275 Million MAC bonds required the unjustifiable sale of sound corporate bonds at a loss of \$20 million to TRS.
- d. by omitting to state to IRS the material fact that the \$182 million NYC bond purchase above violated the IRS exclusive benefit and prohibited transaction rules:26 USC 401/503 and RR 69-494, &RR70-131.
- e. by omitting to state to IRS the material fact that all NYS bond purchases since Dec.1975 have been made at above market price.
- f. by omitting to state to IRS and Congress the material fact that the "Agreement" would increase TRS holdings of NYC obligations from 6% in June 1975 to 56.5% in June 1978, in violation of RR 70-131 and 69-494.

g. by using paragraph 7e(vi) of the "Agreement" as a manipulative device to secure passage of PL 94-236 which suspended for TRS Trustees 26 USC 401/503 granting the equivalent to a license to commit Securities fraud, permitting them to destroy the fully funded character of Pensioner Minority trusts.

h. by using paragraph 5(b) of the "Agreement" as a manipulative and deceptive device to exchange \$275 million of 11% MAC bonds for 6% MAC bonds giving unequal preference and advantage to 27 NYC Savings banks, EXXon, Penney, Union Carbide, IBM, Equitable Life all equal creditors who did not exchange their 11% Macs for 6% Mac bonds.

i. by using the contrivance of concealment of the material fact connected with the \$860 Million NYC bond purchase to prevent the presence of all of the 25,000 Minority Pensioners at the House Ways & Means Comm hearing on Feb 23, 1976. Thus denying Congress material facts necessary in the public interest.

j. by using the deceitful manipulative device of paragraph 7c of the "Agreement" to approve the cashing of all NYC bonds on amortization date EXCEPT those held by TRS/5 pension funds giving unequal preference and advantage to equal creditors.

k. by knowingly accepting misrepresentation by the city under paragraph 7e(iv) of the "Agreement" under which TRS NYC bond purchases were to be conditioned on the city's having made all payments to ⁵pension funds fully required by law. The law requires that all TRS trusts be fully funded. The city owes the active teachers pension trust \$2.7 billion, EX F 1. which it had no intention or capability of paying when it signed the "Agreement". The city owes the 5 pension funds \$8.6 billion as of June 30, 1974.

l. by failing to keep TRS members informed:

1. the last financial report published covered fiscal year ending June 30, 1974

2. the terms of the "Agreement" were not published except in the Congressional Record.

3.the sale of corporate securities at a loss of \$50 million was not reported.

4.The statement in the June2,1975 issue of Business Week quoting Mr. Burns of the Federal Reserve Board as saying any bank lending money to NYC could open itself to share all the suits for violating the prudent man rule of investing, was not reported.

5.TRS members have received no individual financial report or communication from TRS Trustees in the past 25 years in contrast to the practice of annual report distribution to all members by the NY State Teachers Pension Fund and T.I.A.A..

Intent to defraud was shown by TRS Trustees insistence on passage of a state law providing them with exclusion from fiduciary liability and insistence on passage of PL 94-236 to except them from IRS regulation BEFORE buying the \$860 million NYC bonds (except for those bought with the approval of IRS in Dec.1975).

B 6. FRAUD VOIDS A CONTRACT.

If the fraud charges above are proven in a trial of the merits of this case then the "Agreement" would be void as would PL 94-236.

CITATIONS

In Schlick v Penn-Dixie Cement 507 F2d 374 opinion quoted below

is relevant:

Rule relating to information and belief may be relaxed as to matters peculiarly within opposing party's knowledge, as in the situation where complaining stockholders in a derivative suit have little information about the manner in which the corporation's internal affairs are conducted and hence cannot provide details as to an alleged fraud.

Fed.Rules Civ.Proc. rule 9, 28 U.S.C.A.

In Baird v Franklin 141 F2d 238,245:

Fiduciaries must safeguard properties over which they have control.

Granting a right of action in plaintiffs, the final question is whether the breach of duty was a proximate cause of the plaintiff's losses. -19-

Section 10b provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Section 17(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Underlining added.

II

IRS AGENCY ACTION REVIEW UNDER 5 USC 702/706.

1.
The Court below erred in finding that Kirshner had no standing to challenge IRS Agency action.

Plaintiff as Acting Trustee ,alternatively as Private Attorneys General is challenging the Dec.5 &13,1975 actions of Federal defendant Alvin D. Lurie in his capacity as IRS Asst. Commissioner, Employer Plans & Exempt Organizations for issuing letters of Approval for the purchase of \$184 million of NYC bonds by TRS Trustees in violation of 26 USC 401 & 503, RR 69-494, RR 70-131 and Security laws 10 b, 10(b)5, and 17(a) .

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

"The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights * * *." 5 U.S.C. § 706.

THE THREE REQUIREMENTS FOR STANDING ESTABLISHED in Simon v Ky. Welfare 426 US 3841 and Data Processing v Camp 397 US 150 are met as follows:

A 1. The plaintiff was injured in fact by the action he is seeking to have reviewed.

But for the letters of Approval from Comm. Lurie TRS Trustees would:

- a. not have purchased \$184 million of NYC bonds at above market price.
- b. not have sold \$214 million highly rated corporate bonds at a loss of \$30 million in order to make the \$184 million purchase.
- c. not have caused further irreparable injury by depleting TRS assets by replacing varied liquid corporate securities with unmarketable NYC bonds of undeterminable value

A 2. The injury can be traced to the challenged action.

a. Comm. Lurie stated in his Dec. 5, 1975 approval letter that he was aware of the fact that the NYC bond purchase would not be made without his approval.

b. When Comm. Lurie refused to extend his approval to the rest of the

\$2.5 billion NYC bond purchase no further purchases, although scheduled by contract "Agreement" were made by TRS Trustees until after March 19, 1976 when PL 94-236 was passed.

These facts show the causal relationship between IRS action and the injuries sustained by TRS.

- B 1a. The injury is redressable by the court and
- b. the plaintiff's personal stake is such that he stands to profit by the adjudication.

1a1. Under 5 USC 706 above reviewing court shall...set aside agency action...found to be arbitrary...not in accord with the law; contrary to constitutional right...

a2. Comm. Lurie acted arbitrarily, illegally and in violation of Amendment 5 rights by accepting the Dec. 5, 1975 TRS Trustees fraudulent assurance that the proposed \$184 million NYC bond purchase satisfied the 4 investment requisites of RR 69-494 and did not violate the exclusive benefit rule of 26 USC 401 nor prohibited transactions under 26 USC 503, when in fact they violated them in at least five instances, listed in plaintiff's Complaint paragraph 11, and in I above.

a3. Comm. Lurie had the statutory duty to protect the assets of TRS and the interests of TRS pensioners by requiring evidence and facts rather than assuming observance of 26 USC 401 & 503, and RR 69-494. He could not have accepted such an assumption in good faith in view of the following facts:

(1) Every newspaper, radio and TV newsreport headlined the threatened bankruptcy of NYC.

(2) On April 15, 1975 Standard & Poor had suspended its NYC bond rating and on Oct. 29, 1975 Moody's had reduced its NYC bond rating to Caa. As Asst. Commissioner in charge of more than 600,000 registered pension funds, ^{he} surely knew that Caa Moody rated bonds were illegal for purchase by National, State and FDIC banks under 12 USC 24 and 12 CF.R. 1.3(b) as testified to by the Comptroller of Currency and the Chairman of FDIC before the Subcommittee of

the Committee on Government Operations of the House on Oct. 8, 1975.

(3) Comm. Lurie knew 26 USC .503c-1(b)(1) defined "adequate security" as something in addition to the promise to pay on a loan. Certainly not found in a Caa grade NYC bond, the promise by an employer on the verge of bankruptcy, shored up by the lifetime savings of teacher pensioners.

(4) Accepting assumptions of fact material to the making or reviewing a sound buying decision is equivalent to knowingly approving omission and denying existence of facts critical to a reasonable investor or reviewer in making that decision and constitutes fraud on the part of TRS Trustees and Comm. Lurie in violation of Securities laws 10b, 10(b)5 and 17a.

The arbitrary and illegal actions of IRS described above warrant relief. Rescinding the \$184 million NYC bond purchase and restoring the assets of TRS to their original condition to effectuate the purposes of a pension trust is requested as the proper remedy.

B 1b1. Such an adjudication would recover the \$30 million in assets lost and replace illiquid NYC bonds of undeterminable value with A & AA grade corporate bonds which TRS held prior to Dec 5 & 13, 1975, with total value of \$214 million. It would restore the savings and deferred wage investments of the pensioners to a quality position providing assurance of future payment of pensions instead of risking them in the crap game of NYC solvency. It would ^ereestablish the base for a fully funded TRS trust. Considerable stakes for TRS teacher pensioners and TRS itself. The remedy requested here is the same as that ordered in a similar case (although under ERISA). CITATION Eaves v Penn; Usery v Penn 426 F. Supp. 830.

1b2. The substantial probability (Worth v Seldin 422 US 504) that victory in this case would result in plaintiff receiving redress is substantiated by the July 7 & 17, 1977 reports in the N.Y. Times of the

temporary revocation of the tax exempt status of the Teamsters pension fund which led to significant reforms. Also the repayment by NYC of moratorium \$1 billion to its short term note holders after the Court of Appeals decision without recourse to the Banks or City pension funds.

C. The interest of the plaintiff is arguable within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

TRS has been Federally regulated and registered under 26 USC 401 since July 2, 1940. 26 USC 401 & 503 were regulatory reform bills passed in 1938 with the clear intent of Congress to protect pensions. The regulatory function was assigned to IRS because the tax exemption carrot was the device used to induce pension plans to come under regulatory control. 5 USC 702 & 706 were laws passed to provide review and redress for arbitrary or illegal administrative actions. Security laws 10b, 10(b)5, & 17a were passed to protect investors. The actions at issue also involve the 5th Amendment rights of pensioners. The interests of the plaintiff are clearly within the zone of interests to be protected and regulated by the statutes and constitutional guarantees in question.

2.

The Court below erred in finding Kirshner "fails to state any federal claim upon which relief can be granted."

"It appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Has an artful conspiracy involving hundreds of millions of dollars ever been proven without facts obtained by Discovery?

CITATION

Bell v Hood 327 US 682. Justice Black's opinion:

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law

and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Templeton*, 185 U. S. 487, 493, 494; *Binderup v. Pathe. Exchange*, 263 U. S. 291, 305-308.

III

Plaintiff acting as private attorneys general maintains PL 94-236 is unconstitutional.

The Court Below erred in finding "Even if the Court were to proceed to the merits of plaintiff's claim that PL 94-236 is unconstitutional, it is clear that the attack must fail."

1.

DUE PROCESS: PL 94-236/"Agreement" authorization for
The purchase of \$860 million of NYC bonds at above market price replacing sound corporate bonds violates the due process clause because it destroyed much of the life savings/ investment of TRS^{made} by plaintiff and Minority Pensioners, without reasonable certainty that the victims will be justly compensated. The following ^slead_^ to that conclusion:

- a. The irreparable loss of \$50 million through the uncalled for sale of sound corporate bonds yielding adequate return and purchased to hold to maturity. More similar losses threatened.
- b. The undeterminable recovery value of \$1 billion of NYC bonds should they need to be sold to pay pensions is not rationally related to the potential losses. NYC bonds have not been marketable for the past two years.
- c. The \$860 million purchase is contrary to the policy of the United States as expressed in 26 USC 401/503 passed as protective laws in 1938. The purchase is made possible only by PL 94-236 which thus negates public interest.
- d. There is no quid pro quo:
 1. Only the 5 Pension Funds including TRS agree^d to buy \$2.5 billion NYC bonds. The Clearing House banks made NO purchase. In fact they reduced their NYC holdings by \$2.5 billion in the previous 2 years.
 2. Morgan Guaranty & Citibank prohibited NYC bond purchases for the pension funds for which they acted as fiduciaries a year before they signed the "Agreement".
 3. NYC bond amortization payments were made to all holders who

- who were equal creditors but NOT including the 5 Pension Funds.
- e. There is no Trustee fiduciary liability to influence investment judgment by reason of NYSL 1975 Chapter 890 & "Agreement" 7e(iii).
 - f. The purchase ended diversity of investment and destroyed the option to reduce investment risk.
 - g. The release of funds in the event of ^{NYC} bankruptcy litigation would be delayed beyond the expectant life spans of most Minority Pensioners.

CITATION

"...due process is violated because it allows the destruction of property...without reasonable certainty that the victims will be justly compensated."

...Const. Amend. 5. Carolina Environmental S.G.
v U.S.A.E.C. 431 F. Supp. 204

2.

PRECEDENT

- The Court below erred in finding ,
"This action is not the first to raise a constitutional attack against the investment policies of New York City employee retirement pension funds. See Sgaglione v. Levitt, 37 N.Y.2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975); Withers v. Teachers' Retirement System, 76 Civ. 4474 (S.D.N.Y. Dec. 22, 1976); Tron v. Condello, 427 F.Supp. 1175 (S.D.N.Y. 1976). These cases have carefully considered the facts and the law as it applies to this matter; thus many of the claims made here are capable of summary disposition based upon precedent which this Court finds highly persuasive."
- C. None of these cases have considered the facts and law as it applies to Kirshner v U.S.A. et al.
 - 1. In Sgaglione v Levitt the Court of Appeals ruled that NYL 1975 Chapter 890, exempting "5 Pension Fund" Trustees from fiduciary liability & authorizing 100% investment by them in NYC bonds was legal because the Legislature had the right to make that decision. This in effect

voided the exclusive benefit rule for the 5 Pension Fund Trustees in N.Y.State but it in no way changed the exclusive benefit rule of 26 USC 401 under which TRS has been regulated since 1940.

a. The reasonableness of Sgaglione has never been tested in a Federal Court.

b.State Courts do not have jurisdiction over review of Federal Agency Action, Federal Securities laws or 26 USC 401/503, issues raised in this case..

c.This case does not challenge the constitutionality of any State law which Sgaglione did.

2. There has been no decision in Withers v TRS. If the facts & law in Withers applied to this case Judge Conner would have accepted jurisdiction of it as requested by Defendant Trustees prior to the Withers trial, After reading the Kirshner Complaint he did not.

3. Tron v Condello involved the challenge of constitutionality of two state laws and the denial of voting rights for the election of teacher TRUSTEES by pensioners. None of these issues are raised by Kirshner in this case.

Therefore the cases above cannot have established appropriate precedent. Defendant Trustees proposal to refer to State Courts would in effect deny judicial review consigning it to twist in the winds of limbo between the heaven of Federal review and the hell of Sgaglione.

The Court below erred in finding "Plaintiff's equal protection argument...must fall since the investment decisions of the Trustees have a rational basis...the actions of the Trustees bear a relationship to a legitimate state goal, i.e. the protection of the fiscal integrity of the City of N.Y."

The goal identified by Congress (the State in this instance) in

PL 94-236 is given as: (2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will—
 (A) maintain the ability of the city of New York—
 (i) to make future contributions to the plan or trust, and
 (ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and
 (B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; or

The PL 94-236/"Agreement obliging TRS to buy \$860 million NYC bonds is completely at variance with the specific purposes identified in paragraph (2) above:

Considering each item in (2) above:

(i) The city makes no "contributions" whatsoever to the fully funded pension trust of the retired teachers from which most of the \$860 million is being siphoned.

(ii) The city has no "future obligations to pay...benefits" to retirees. This is the exclusive obligation of their fully funded trust. If TRS goes bankrupt the city has no obligation to pay pension^s

(B) The city has nothing to do with "protect(ing) the sources of funds to provide retirement benefits." That is the job of the Trustee & IRS. PL94 236 authorizes the dissipation of the sources by removing the protection of 26 USC 401/503. This induces the sale of TRS sound corporate assets at a loss & their replacement with NYC bonds bought at above market. This destroys the fully funded character of^{of pensioners trust} TRSⁱⁿ an arbitrary, discriminatory and unreasonable way, in violation of the equal protection clause, Securities laws 10b, 10(b)5, 17a, & 26 USC 401/503.

CITATION

So. Dist.N.Y.,
In Barchi v Sarafan, 76 Civ 3070 (GLG) opinion #46286 page 16, 17:
In relation to a State attempt to justify disparate treatment the Court ruled such action "as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded absence of supporting evidence, that the burden is connected to such a policy."

Citing Carey v Population Services Int. __US__ (1977), 45 LW 4601, -6
There is no supporting evidence connecting the differences in treatment of the 5 Pension Funds to that accorded 600,000 other Federally registered pension funds.
Furthermore, the limitation to the 5 city Pension trusts is unnecessary to serve any legitimate public purpose since other arrangements rationally related to the interests asserted by the Court below could be devised and because PL94-236 is only a temporary solution to the city's financial problems which require permanent solution.

CITATION

Carolina Environmental S. G. v USAEC 431 F Supp. 204
Even if the purpose of the law is legitimate, the means chosen is discriminatory and unconstitutional.

CITATION

A taxing act which shows oppressive discrimination denies equal protection.
Welch v Henry 305 U.S. 135

4.

The Court below erred in finding "Plaintiff's equal protection argument must fall since the investment decisions of the Trustees have a rational basis and since the distinction between present and retired teachers is not a distinction which would be subjected to strict judicial scrutiny."

Every issue raised in this case requires an examination and understanding of the distinction between present and retired teachers in TRS.

PRESENT TEACHERS

80,000 Employed Majority TRS members
In pay-as-you-go trusts:
a. Annuity Savings Fund
b. Contingency Reserve Fund.
Combined assets \$239 million.
Per capita \$3,000.
Unfunded accrued liability \$2.7 billion
% of assets which are funded: 8%.
Inadequate for accrued liabilities.
1973-4 City contribution: \$268 million.
% of city contribution to pay-as-you-go trust of present tchrs: 100%
Excess Interest income above actuarial requirements returned to city: NONE.
Pension contributions determined by United Federation of Teachers for past 8 years.
Average wage including fringe benefits \$22,000.
UFT Dec '76 wage agreement provided \$4,198 increase over next 3 years.
Elect 3 Teacher Trustees to TRS.
In addition to city salary, teacher TRS Trustees receive Approx. \$8,000 a year from UFT, not paid to other UFT Comm. Chairmen with equal work loads and responsibilities.
% risk to pay-as-go trust by TRS buying city bonds: very slight; 8%?
Preferential treatment by equating pay-as-you-go fund with Pensioner Minority fully funded plan.

RETIRED TEACHERS

25,000 Pensioner Minority TRS members.
In fully funded trusts. Independent of present teachers pay-as-you-go trusts.
a. Annuity Reserve Fund
b. Pension Reserve Fund.
Combined assets \$1.6 billion (1974 Report)
Per capita \$64,000.
Unfunded accrued liability: NONE.
% of assets which are funded: 100%.
Income adequate to pay all pensions for life.
1973-4 City contribution: NONE.
% of city contribution to fully funded trust of retired teachers: ZERO.
Excess Interest income above actuarial requirements returned to city : \$55.5 million. 1973-4 TRS Report.
All retired teachers entered TRS before UFT represented teachers. All made large contributions compared to present tchrs.
Average pension \$6,300. 8,000 of Pensioner Minority receive less than \$4,000 yr.
No increase in cost of living allowance since 1970.
Not permitted to vote for Trustees.
No representation.
% risk to fully funded trust by TRS buying city bonds: 56.5% to 100%.
equating
Discriminatory treatment by no risk pay-as-you-go fund with fully funded plan.

All the losses, all the risks, all the property damage, all the constitutional rights violated, all the discrimination, all the frauds are at the expense of the retired teachers.

CITATION

If the effect of the law denies him a right he would otherwise have then constitutionality may be questioned. Petersen v Clark 285 F Supp 700.

5.

The Court below erred in finding:

"...plaintiff's equal protection attack on PL 94-236 must fail since the legislation has a reasonable relationship to the legislative goal, i.e. the fiscal preservation of the City of NY".

A. TRS & its Trustees have no rational connection with the fiscal preservation of NYC.

B. The goal expressed above is in conflict with the goals^r and rules set up for the preservation of pension funds;

1. The 146 year old prudent man rule.
2. The exclusive benefit rule 26 USC 401; RR 70-131; RR 69-494.
3. The prohibited transaction rule 26 USC 503.

PL 94-
C. 236/ "Agreement" is an irrational, discriminatory imposition on a vulnerable, aged, predominantly poor, politically helpless Pensioner Minority. It puts a greater burden on 90,000 city pensioners than on six of the seven largest banks in the USA and the federal government combined.

D. Congress used PL 94-236 to illegally legislate an unchallengeable sound investment status for unsound, speculative NYC bonds substituting its fiat for the standards and ratings set for them by Moody's, Standard & Poor's, Federal Bank law 12 USC 24, FDIC & Controller of Currency Regulations for National Banks at the expense of plaintiff and TRS pensioner minority in violation of our 5th Amend. rights. It also legislated a TRS loss of \$188 million in reduced MAC bond interest, not legislated for other 11% Mac bond holders.

CITATION

Test of reasonableness can be judged by reference to a common standard of conduct...

F & A Ice Cream Co. v Arden Farms 98 F. Supp. 139

CLASS LEGISLATION

E.

Under equal protection of the law exception is allowed if rationally related to a legitimate government purpose. If not, or if based on a discriminatory standard which operates to the peculiar disadvantage of a minority class the classification is 'suspect' and requires a compelling reason to sustain it.

The government purpose was stated by Mr. Walker, Asst. Secretary of Treasury, "On Dec.9,1975 the President signed the NYC Seasonal Financing Act...,authorizing... loan up to \$2.3 billion... to the city of NY in order that the city might maintain its essential government services."

There is no rational relation between this purpose and PL 94-236 which was "part of the overall program to render financial assistance to NYC", because PL 94-236 singled out and treated as a separate and unequal minority:

- a. 25,000 NYC employee pensioners out of more than 2 million people employed in NYC.
- b. the plaintiff and 25,000 TRS minority pensioners who had⁸
 - a. 100% vested interest in TRS funded reserves compared to the 83,000 employed TRS majority with a 8% vested interest in a pay-as-you-go plan.
- c. the five NYC employee pension funds out of 600,000 qualified pension funds.
- d. the five NYC employee pension fund entities out of hundreds of thousands of business entities in NYC including banks, insurance companies, corporations, stores, unions , property owners etc. whose assets were equally independent of the city and equally sacrosant and for whom a viable NYC was equally important.

It is not rational but arbitrary and unjust to discriminate against the plaintiff and TRS minority pensioners singling out

those who are least responsible for the evils the bills are directed against and least able to bear the burden. The assets and the deferred wages of TRS consists of the hard earned lifetime savings of the plaintiff and TRS minority pensioners. Plaintiff and TRS minority pensioners made regular contributions while they were employed to the independent TRS over a period of 25 to 50 years. Most of them were employed from 15 to 30 years before the present NYC financial crisis occurred.

There is no rational connection between the plaintiff and TRS minority pensioners and the city of NY because they severed all connections when they retired years ago. There is no rational connection between the assets of TRS which are coopted and dissipated by PL 94-236 and the city of NY. There is no rational connection between TRS assets of plaintiff and TRS pensioner minority and the wasteful practices, excessive borrowing, false financial statements, welfare problems, decline in employment and other evils which produced NYC's financial crisis, nor will the evils be corrected by funneling off TRS corporate bond assets and making TRS insolvent.

CITATIONS

Class legislation must affect alike all persons within a class and must have a reasonable and substantial relation to the subject of legislation.

Classification must not be arbitrary, discriminatory or irrational.

Classification is arbitrary and unreasonable and unjustly discriminatory without a factual basis.

Eisenstadt v Baird 92 S. Ct. 1029

Morey v Doud 77 S. Ct. 1344

EQUAL PROTECTION ANALYSIS

- F. "...Equal Protection analysis requires strict scrutiny of a legislative classification when it impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."

San Antonio School District v Rodriguez 411 U.S. 1,16.
quoted in Mass. v Murgia 427 U.S. 312.

ALTERNATIVELY:

Suspect Class: Plaintiff & Pensioner Minority are a suspect class:

1. they are "Saddled with disabilities", 86% are over 65 yrs old; 35% are over 75; most are poor; 8,000 of the 25,000 receive less than \$4,000. a year; many are ill; all are scattered, isolated, unorganized, unrepresented, defenseless and vulnerable.
 2. they "are subjected to purposeful unequal treatment" evidenced by allegations above.
 3. they are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Rodriguez supra 28. If the fully funded of the Pensioner Minority been part of those controlled by annuity assets, the T.I.A.A.; the Metropolitan Life Insurance Co.; or those of the pension annuity funds under fiduciary control of Citibank or Morgan Guaranty would they have been singled out for the same singular discriminatory treatment?
- G. PL94-236 singles out, treats differently and discriminates against 90,000 "suspect" pensioners out of 35 million others whose lifetime savings are still protected and properly so by 26 USC 401/503.
- H. PL 94-236 authorizes replacement of plaintiff's & Pensioner Minority's vested rights in a fully funded, solvent TRS pension investment fund with vested rights in a ½ funded, speculative pension fund with 56.5% of its assets in insolvent NYC bonds.

CITATION

"No person shall be deprived of life, liberty, or property without due process of law." ,secures the individual vs any federal action divesting vested rights.

S.W.Petrol. v Udall 361 F 2d 650

Also: US vs Yount 267 F 861

UNREASONABLE SHARE OF RISK

PL 94-236 and the November 26, 1975 "Agreement" were created for the exclusive benefit and for "the fiscal integrity of the City of New York." This was irrational and in violation of the equal protection clause:

1. because they placed the cost of that benefit on an arbitrarily chosen segment of society, the Pensioner Minority, which put their future pension payments in jeopardy by the potential bankruptcy of NYC and by destroying the fully funded character of their trusts, which previously meant complete independence of the City of NY and its insolvency. 56.5% NYC bonds by 6/78 destroys full funding.

2. NYC bond debt stands at \$12.5 billion. PL 94-236 obligates the 5 Pension Funds with a force equal to law, to increase their city obligations to \$3.5 billion by June 1978, Thus 90,000 retirees will be left holding 28% of bond debt of a city of 8 million.

3. A material fact not publicised is NYC accrued liability to the 5 Pension Funds amounting to \$8.5 billion. Add to this

	12.5	"	bonded debt
	4.	"	MAC bonds issued
TOTAL TRUE DEBT OF NYC	\$25.	"	

Of this total the 5 NYC Pension Funds, unless enjoined, will hold by June 1978: \$3.5 billion NYC bonds & \$3.6 billion accrued liability totaling \$12 billion and equal to close to 50% of the total true debt of NYC.

4. In the event of NYC bankruptcy the major loss is placed on those least able to bear it who were in no way responsible for the city's fiscal mess.

CITATION

"5TH AMENDMENT restrains such discrimination legislated by Congress as amounts to a denial of due process by unjust discrimination between persons of similar circumstance material to their rights."

Schlesinger v Ballard 95 S.Ct. 572

DESTROYING REGULATORY AND FIDUCIARY PROTECTION FOR TRS VIOLATES
THE EQUAL PROTECTION CLAUSE.

Under color of PL94-236 the "Agreement" is legalized, and its paragraphs
7e(iii) & (vi) remove ^{TRS} Trustees fiduciary liability and application
of exclusive benefit & prohibited transaction rules under 26 USC
401/503. This

1. Is irrational because it shows the Trustees intent was to violate those laws, otherwise there would be no demand for Congressional exception.
2. Is irrational because it removes the remedy for wrongdoing: fiduciary liability.
3. Is irrational because it applies to only 5 of 600,000 pension plans under IRS.
4. Is irrational because it nullifies judicial review provided by 702/706 by removing IRS supervision subject to that review, destroying a constitutional remedy for wrongdoing.

Right of judicial review, of fiduciary liability, protective federal laws 26 USC 401/503 & 5 USC 702/706 are forms of statutory entitlement and depriving Plaintiff & Pensioner Minority of them is a violation of due process.

CITATIONS

"Statutory entitlement is a form of property with due process protection vs deprivation without procedural due process... A recipient of government benefits under federal legislation should not have those benefits withdrawn without notice and hearing."

Goldberg v Kelly 397 US 254

CITATION

Police power regulation infringes on property interests unless imposition has some reasonable relation to the evils to be eradicated.

Justice Brandeis. Nashville C&StLRRvWalters 294 US 405

PUBLIC INTEREST

Plaintiff assumes that public interest in saving NYC was the intent of Congress in passing PL 94-236. The bill's legislative history is revealing. At the Hearing on Feb. 23, 1976 before the Comm. on Ways & Means, (Federal Defendants Memo to Dismiss, Exhibit 2) the lead witness was Asst. Sect. of Treasury Walker:

STATEMENT OF CHARLES M. WALKER, ASSISTANT SECRETARY OF
THE TREASURY FOR TAX POLICY; ACCOMPANIED BY ROBERT...

Mr. WALKER. Thank you very much.

Mr. Chairman and members of this distinguished committee, I am pleased to appear before you today to testify on the New York City pension fund legislation, H.R. 11700.

This legislation is part of the overall program to render financial assistance to New York City. On December 9, 1975, the President signed the New York City Seasonal Financing Act of 1975, authorizing the Secretary of the Treasury to loan up to \$2.3 billion at any one time to the city of New York in order that the city might maintain its essential governmental services.

The Seasonal Financing Act was enacted by Congress with the understanding that the agreement dated November 26, 1975, between the Municipal Assistance Corporation, several of New York City's commercial banks, five New York City pension funds and the New York sinking funds would take effect. This agreement, itself, was generally conditioned upon the enactment prior to February 1, 1976, of Federal legislation that "would provide, by way of guarantees or otherwise, for the seasonal financing needs of the city over the period from the effective date thereof through a date not earlier than June 30, 1978, in a maximum amount of not less than \$2.3 billion at any time outstanding."

As part of the New York City Agreement, the five pension funds which entered into the agreement—namely, the New York City Employees' Retirement System, the Board of Education Retirement System for the City of New York, the New York City Fire Department Pension Fund, the Teachers' Retirement System for the City of New York, and the New York City Police Pension Fund—agreed to purchase New York City bonds in the principal amount of approximately \$2.5 billion through fiscal 1978 on a scheduled basis. The funds agreed to purchase, prior to January 1, 1976, serial bonds of the city with a face amount of \$30 million, bearing interest at the rate of 6 percent a year.

All other serial bonds of the city to be acquired by the funds were to bear interest at the rate of 9 percent a year. All of these purchases were conditioned upon receipt of a ruling from the Internal Revenue Service or upon congressional enactment of legislation to the effect that the purchases would not constitute prohibited transactions or otherwise adversely affect the qualified status of the pension funds for purposes of the Internal Revenue Code of 1954.

If the pension funds were to lose their qualified status under the Internal Revenue Code simply by reason of the city bond purchases, the income earned by the funds might be subject to Federal income taxation and participants might be required to pay an immediate tax on current plan assets and contributions to the plans.

As governmental retirement plans, the New York City pension funds are exempt from the prohibited transaction rules of the Employee Retirement Income Security Act, the 1974 pension reform law. However, the prohibited transaction rules that were generally applicable to all pension plans under prior law continue to apply to such governmental plans.

Mr. Walker's testimony, (underlining by plaintiff), proves (a) that the primary purpose of passing PL 94-236 was "to render financial assistance to NYC." (b) the federal loan of \$2.3 billion was conditioned on the Nov. 26, 1975 "Agreement". (c) The "Agreement" was conditioned on suspension of 401a & 503b.

Discriminatory suspension of federal laws 26 USC 401/503 is an unconstitutional violation of the equal protection and due process clauses of the fifth Amendment.

CITATION

A statute in conflict with the Constitution is invalid regardless of the intent of the legislature in enacting it...

Anderson v Town of Forest Park : Also: Linder v US
239 F. Supp. 576 : 45 S.Ct. 446

9.

PL 94-236 is unconstitutional because it intentionally and effectively mandated the purchase of NYC bonds by TRS Trustees:

- a. The "Agreement" conditioned the purchase of NYC bonds on IRS or Congress voiding application of 26 USC 401/503.
- b. Congress complied granting advance immunity for violating federal laws that applied to 600,000 other pension fund trustees.
- c. Congress also approved a State law which voided fiduciary liability for NYC bond purchases.
- d. PL 94-236 thus removed two remedies for wrongdoing (1) liability (2) judicial review.
- e. Mr. Walker, Asst Sect. Treasury in testimony above stated, "The Seasonal Financing Act was enacted by Congress with the understanding that the agreement dated Nov. 26, 1975 would take effect.
- f. The "Agreement" obliged TRS to buy \$860 million NYC bonds. PL 94-236 made the "Agreement" a part of federal law.
- g. The cumulative effect of the above was to ^{effectively} mandate the NYC bond purchase by TRS Trustees.

CITATIONS

Emergencies do not authorize the suspension of the Constitution or its guarantees.

Legislature may not by means of statutory enactment do indirectly that which it is prohibited from doing directly by constitutional provision.

Veix v 6 Ward Bldg. & Loan Assn. , 60 S. Ct. 792
US v Brignoni-Ponce, 95 S.Ct. 2574

10.

Pl 94-236 is unconstitutional because it is vague and illegally removes a remedy for wrongdoing.

Pl 94-236 incorporates the "Agreement" into Federal law.



Public Law 94-236
94th Congress, H. R. 11700
March 19, 1976

An Act

Relating to the application of certain provisions of the Internal Revenue Code of 1954 to specified transactions by certain public employee retirement systems created by the State of New York or any of its political subdivisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any pension plan or trust which, on December 5, 1975, was a party to the amended and restated agreement of November 26, 1975, set forth on pages S21308, S21309, and S21310 of the Congressional Record published on such date, and any trust forming a part of such a plan, shall not be considered to fail to satisfy the requirements of section 401 (a) of the Internal Revenue Code of 1954, and shall not be considered to have engaged in a prohibited transaction described in section 503(b) of such Code, merely because such plan or trust does any or all of the following:

New York,
Public employee
retirement
systems.

26 USC 401.

26 USC 503.

PL94-236 is unconstitutional because "Agreement" paragraph 7e(iii) below is vague and ambiguous , provides for no guidelines or restrictions on the state law and illegally removes a remedy (fiduciary liability) for wrongdoing.

"7e(iii) a State law containing provisions with respect to the legal status of the Pension Funds and their Trustees responsibilities, satisfactory to such Trustees, shall have been enacted and shall be effective."

The NYL 1975 Chapter 390 waives fiduciary liability for 5 Pension Fund Trustees for purchases of NYC bonds up to 100% of assets. It was on the demand passed of TRS Trustees to meet the requirement of "Agreement" 7e(iii).

PL94-236 was passed in violation of procedural due process without a full or fair hearing.

The House Ways & Means Comm report on the hearing on HR 11700, (Federal Plaintiff's Memo on law Exhibit 2.), held on Feb. 23, 1976 consists of 51 pages of testimony from union leaders and government officials. Not one of the 90,000 NYC pensioners whose life savings^{are} invested in^{the} pension trusts at risk nor one representative of a pensioners organization was informed, invited, or heard in violation of procedural due process. No notice of the hearing appeared in any NYC newspaper.

Not only was Congress denied the material facts involved in the fraud but the House was mislead before voting by Chairman of the House Ways & Means Comm. Ullman who stated as recorded on page H 1397 Congressional Record, March 1, 1976:

CONGRESSIONAL RECORD—HOUSE H 1397

March 1, 1976

The legislation is designed to permit the purchases by the pension funds of these bonds without violating the prohibited transactions rules of the Internal Revenue Code, or the requirement that pension plans be for the exclusive benefit of employees and their beneficiaries. If these provisions were violated, the employees covered by the plans could be taxed currently on their vested benefits, the employees would lose estate and gift tax exclusions, and they would not be entitled to special lump-sum distribution rules of the tax law. Under the agreement, the pension funds need not buy the bonds if this would violate either of these provisions of the tax laws. Then, the banks do not need to make their purchase if the pension funds do not, and this would mean an end to the whole plan for the sale of the New York City bonds.

The legislation permits the five pension plans to engage in the following transactions without endangering the tax status of the plans: First, to enter into the November 26, 1975, agreement; second, to acquire and hold securities under the agreement; third, to make elections and waivers under the agreement; and, fourth, to perform other acts provided by the agreement. Also, the legislation permits the plans to take the financial condition of the city into account in making investment decisions.

Amendments and waivers of provisions of the agreement which affect the tax status of the pension plans are to be disapproved by the Secretary of the Treasury if found to be inconsistent with the purposes of the legislation. The Secretary has 30 days after receipt of such proposed amendments or waivers and supporting material to make this determination. Also, reports to the Treasury and the Congress must be furnished periodically on the financial status of the plans.

that the 5 Pension Funds would not buy the NYC bonds unless the prohibited transaction & exclusive benefit rules were waived for them, "Then, the banks do not need to make their purchase if the pension funds do not, and this would mean an end to the whole plan for the sale of the NYC bonds." (Underlining added.)

This was a materially misleading statement because the "Agreement"

provided for absolutely NO purchase of city bonds by the banks.
\$2½ billion NYC bonds
All the buying[^] was to be done by the 5 Pension Funds with no
consideration in exchange. Also concealed from Congress was the fact
that these same banks had unloaded \$2½ billion NYC obligations in the
previous two years and had prohibited their fiduciary pension
accounts from buying NYC bonds a year earlier; that NYC bonds were
rated Caa by Moody's and therefore illegal for purchase by^{all} National,
or FDIC banks in the USA.

The damage done was compounded by Mr. Ullman's status as Chairman
of the House Ways & Means Comm; he is one of the most influential
& credible members of the Congress. I know of no bill he has
recommended that has failed to pass the House.

CITATION

"The legislative judgment is presumed to be supported by facts known
to legislature, unless facts judicially known or proved preclude that
possibility". Egan v US 137 F2d 369.

CITATION

"Two fundamental principles or minimal requirements of due
process are notice and opportunity to be heard or to defend."

Const. Amend. 5 Aetna Ins. Co. v Hartshorn 477 F 2d 97

CITATION

Special to The New York Times

ALBANY, Nov. 19—Following are excerpts from the majority decision of the State Court of Appeals, written by Chief Judge Charles D. Breitel, declaring the New York City Emergency Moratorium Act of 1975 unconstitutional:

In short, what has happened is those responsible have made an expedient selection of the temporary noteholders to bear an extraordinary burden. The invidious consequence may not be justified by fugitive recourse to the police power of the state or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations.

Protection of Rights

The constitutional prescription of a pledge of faith and credit is designed, among other things, to protect rights vulnerable in the event of difficult economic circumstances. Thus, it is destructive of the constitutional purpose for the Legislature to enact a measure aimed at denying that very protection on the ground that government confronts the difficulties which, in the first instance, were envisioned.

Moreover, in denying access to the courts, there is in effect a denial of all remedy. It is elementary that denial of a remedy is a denial of a right.

But it is a constitution that is being interpreted and as a constitution it would serve little of its purpose if all that it promised, like the elegantly phrased constitutions of some totalitarian or dictatorial nations, was an ideal to be worshiped when not needed and debased when crucial.

Excepting short term note holders from payment by discriminatory suspension of NYC's pledge of full faith and credit is comparable to excepting five NYC employee pension funds from 401a & 503b ministerial and judicial review, by discriminatory suspension of U.S. Governments pledge of full faith in 5th Amendment Constitutional rights of plaintiff and TRS minority pensioners.

CITATION

A law repugnant to the constitution is void.

Marbury v Madison, 1 Cranch 137, 2 L. Ed. 60

CONCLUSION

MOTION FOR A PRELIMINARY INJUNCTION.

this
Plaintiff moves [^] Court for preliminarily enjoining defendant TRS Trustees from the sale of TRS corporate assets to purchase NY City obligations; preliminarily enjoining defendant Trustees from renewing New York City obligations that become due, by a voluntary moratorium or "stretch", unless such action applies to all similar creditors equally; preliminarily enjoining the enforcement of PL 94-236; preliminarily enjoining the further purchase of New York City obligations, or New York City Mitchell-Lama housing mortgages or bonds, by defendant Trustees.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

A preliminary injunction requires

- A. A show of irreparable harm.
- B. Balancing the extent of plaintiff's irreparable harm with defendants injury.

C. Likelihood of success.

A.1. Alfred Kirshner, Plaintiff acting as a stockholder in a derivative suit, appearing alternatively as ^{private} attorneys general, has a vested interest in the \$1.6 billion TRS pensioners funded assets which has been irreparably harmed by the loss of \$50 million by the TRS Trustees sale of its sound corporate assets and undeterminable millions in the exchange of its corporate securities for \$527 million of NYC bonds of undeterminable value without exchange of any substantial consideration. This impaired the plan's ability to meet its obligations and was in violation of 26 USC 401 & 503. Additional harm inflicted by purchase of NYC bonds at par, above market price.

2. Irreparable harm extended by increase in holdings of NYC obligations from 6% to 51% ⁱ destroying diversity and liquidity.

3. Irreparable harm to quality of assets of TRS by buying Moody rated Caa, 7th grade, NYC bonds prohibited for investment by 14,400 FDIC banks and all National banks.

- illegal
4. NYC bonds are an unsound investment for TRS and purchase should be enjoined:
- a. They are rated Caa by Moody's, below investment level and removed entirely from listing by Standard & Poor's. ^{Affidavit} (Exhibit N, 2 pages).
 - b. Income from NYC bonds is tax free. Equivalent return from corporate securities which are tax free to TRS is obtainable from approved quality Grade A or Aa. Superior quality is essential for a sound pension fund portfolio.
 - c. 35 to 51% investment in any one security is an unsound practice. ERISA limits employer ^{securities} investment to 10%. 35 to 51% investment in NYC bonds by TRS is in violation of RR 70-131, 1970-1, C.B. 135 because the security for the debt is inadequate.
 - d. The varied and highly-rated corporate securities would better serve the exclusive benefit rule if held instead of sold at a loss.
 - e. Under the November 26, 1975 "Agreement" all NYC bonds held by TRS must be retained at maturity as no other creditors are required to do.
 - f. The New York Bank for Savings, fourth largest in the USA, reported NYC holdings as of December 31, 1975 as less than (1/4) of one quarter of one per cent of assets. ^{Affidavit} (Exhibit O).
 - g. The six largest NYC banks held approximately \$3.5 billion NYC obligations in June 1974. By December 31, 1975 their holdings were reduced to \$1.7 billion or 86/100 of 1% ^{Affidavit} (Exhibit P). *of total assets.*
 - h. Caa rated NYC bonds were illegal for investment by all National and FDIC banks before TRS Trustees signed the "Agreement" to buy \$860 million of them. IRS standards for pension funds under 26USC 401 ^{/503} are equally high. Pensioners deserve the same protection as bankers. See testimony of Comptroller of Currency and FDIC Chairman in Affidavit above. Also Exhibit Q, 3 pages.

B.1.a. Plaintiff and TRS pensioner minority in like situation, have limited lifetime prospects, 35% are age 75 to 100, 86% are over 65, while only 10% of U.S. population is over 65.

b. Plaintiff and approx. 8,000 TRS pensioners receive less than \$4,000 yearly pensions which is the main source of income for most. TRS pensions are at risk by TRS Trustee Defendants sale at a loss of sound, highly rated corporate securities and their replacement by speculative, illegal for bank investment Caa rated NYC bonds.

c. NYC's reported debt is \$12.29 billion. Unreported is an additional \$8.4 billion in accrued liability due the five NYC employee pension funds, (Affidavit Exhibit F 1, line 5). Plus \$4 billion in MAC bonds.

d. April 1977 GAO report (Plaintiff's Memo re Federal Defendants Motion for Dismissal, Exhibit ^{R 1-5} _^), says fiscal outlook for N.Y.C. is grim.

e. Page 206, March 1977 Fortune Magazine, Alan K. Campbell, Dean, School of Public Affairs of U. of Texas is quoted, "...if the city were a sovereign country there would be no way to survive unless it devalued its currency." NYC's currency is its bonds and I.O.U.'s. The combined bond and accrued liability debt to five employee pension funds is more than \$11 billion. Unless injunction is granted this will reach \$12.5 billion by June 30, 1978. TRS is one of these five debtor pension funds, holding this currency of dubious value, on which payment of our pensions depends. Unless the injunction is granted TRS will be insolvent by June 1978 if not sooner. The TRS Trustees plan to replace more of the sound high grade investment bonds with low grade, speculative NYC bonds, in an additional amount of \$343 million by that date.

B.2.a. Federal defendants will suffer no injury if they are obliged to carry out their ministerial duties under 26 USC 401a & 503b as they have been doing since 1938 and are now doing for 600,000 other registered pension funds. The sovereignty of the U.S.A. is not threatened. No damages are involved, only faith in the rule of law.

B.2.b.(i) Defendant Trustees could only benefit by preserving the status quo, by the enjoinder of NYC obligation purchases because this would improve the solvency of TRS by retention of its sound corporate securities.

(ii) NYC's financial Emergency has passed. It claims a balanced budget. It met the need to pay back \$1 billion to short term note holders following the Court of Appeals Moratorium decision, without help from city employee pension funds or clearing house banks.

(iii) TRS Trustee Harrison Goldin is both seller and buyer of NYC bonds. Despite this conflict of interest Trustee Goldin urged and influenced the other Trustees to vote for the "Agreement" which pledged TRS to buy additional NYC bonds amounting to \$860 million by June 28, 1978. This was exclusively for the benefit of NYC and at the expense of TRS and its

beneficiaries in violation of 26 USC 401 & 503 & Securities laws.

C. The probability of success on merit is based on :

1. The evidence submitted on the previous pages, and in the Exhibits.
2. Material to be obtained by Discovery and from Expert Witnesses.
3. That part of the S.E.C. Report of August 26, 1977 which deals specifically with the improprieties and illegalities involved in the finances of the "5 pension funds" since they have been exploited for the benefit of NYC at the expense of the pensioners.

Exhibits as SEC
Attached to end of Citation.

4. Recent decisions which support plaintiff's position in Citations above
Daniel v Teamsters; Eaves v Penn; Carolina Environ. S.G. v USAEC; Barchi v Sarafan; Carey v Population S.; Klamberg v Roth; Flushing N.B. v NYC.
5. Faith in the viability of the Prudent Man Rule, in the Constitution, and faith in the Federal Judiciary.

CONCLUDING PLEA

Appellant pleads for:

1. An injunction to halt^{the} further sale of TRS assets,
or the purchase of N.Y.C. or M.A.C. bonds by
Defendant Trustees.
2. An injunction to prevent the enforcement of
PL 94-236.
3. Pending a trial of the merits of the action.

Respectfully submitted,

Alfred Kirshner

Appellant Pro Se